



INTERIOR BOARD OF INDIAN APPEALS

Kelly Edwards v. Rocky Mountain Regional Director,
Bureau of Indian Affairs

41 IBIA 77 (05/25/2005)



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
801 NORTH QUINCY STREET
SUITE 300
ARLINGTON, VA 22203

KELLY EDWARDS,	:	Order Affirming April 4, 2003,
Appellant,	:	Decision and Dismissing Appeal
	:	from April 25, 2003, Decision
	:	
v.	:	
	:	Docket Nos. IBIA 03-99-A
	:	IBIA 03-114-A
	:	
ROCKY MOUNTAIN REGIONAL	:	
DIRECTOR, BUREAU OF INDIAN	:	
AFFAIRS,	:	
Appellee.	:	May 25, 2005

Appellant Kelly Edwards appeals from two decisions issued by the Rocky Mountain Regional Director, Bureau of Indian Affairs (Regional Director; BIA), both pertaining to Range Unit (RU) 207 on the Blackfeet Reservation. In an April 4, 2003, decision, the Regional Director affirmed the denial of Appellant's request for reimbursement of 1999 grazing fees for RU 207 (Docket No. IBIA 03-99-A). In an April 25, 2003, decision, the Regional Director affirmed the withdrawal of four allotments from RU 207 (Docket No. IBIA 03-114-A). For the reasons discussed below, the Board affirms the April 4, 2003, decision and dismisses Appellant's appeal from the April 25, 2003, decision.

In January 1999, the Blackfeet Tribal Allocation Committee allocated RU 207 to Appellant, a member of the Blackfeet Tribe. On May 14, 1999, the Superintendent, Blackfeet Agency, BIA, issued Appellant a grazing permit for RU 207 for a term beginning March 10, 1999, and ending not later than March 9, 2009. The permit stated that the grazing season for each year was June 1 through August 31 and that the grazing capacity of the RU was 300.4 AUM's (animal unit months). At the time the permit was issued, RU 207 contained 1,259.46 acres of allotted land.

Appellant's permit was modified on June 15, 1999, at his request, to provide for year-long/on and off grazing. Under the modification, all other provisions of the original permit remained the same.

Docket No. IBIA 03-99-A

During the permit period preceding the 1999-2009 period, another Blackfeet cattle operator, Dale Pepion, had grazed cattle on RU 207, although he was not the permittee. Pepion continued to graze cattle on RU 207 after it was allocated to Appellant. In July 1999, BIA began trespass proceedings against Pepion.

At some point prior to December 10, 1999, Appellant sought reimbursement of the grazing fees he had paid for the 1999 grazing season. ^{1/} The Superintendent responded on December 10, 1999, stating:

This letter is in regard to the trespass that occurred on Range Unit #207 by Dale Pepion's livestock. We are in the process of attempting to secure payment of penalties and fees from Mr. Pepion.

In regard to your request to be reimbursed the grazing fees you paid in 1999 for Range Unit #207, there is no provision in the regulations for reimbursement. The fees have been distributed to the landowners, and there is no account from which we could draw funds for a reimbursement. In addition, on two separate occasions (June 30, 1999, and August 17, 1999), cattle under your control were observed grazing on Range Unit #207. * * * One of the terms under "Range Control Stipulations," Form 5-5518, states: "Unless the number of livestock specified in the permit is reduced by the Commissioner of Indian Affairs, the permittee will not be allowed credit or rebate in case the full number of livestock is not grazed on the range unit." Therefore, we cannot reimburse the fees you paid.

Appellant appealed the Superintendent's decision to the Regional Director, alleging that a combination of grazing by Pepion's cattle and a lack of rain had caused the loss of 70% of the AUM's for which he had paid for the 1999 grazing season. Appellant alleged that he had made numerous complaints to BIA about the trespassing cattle and had sought removal of the cattle and construction of fences to prevent further trespasses. He requested that he "be reimbursed for 70% of [his] AUM's costs [from] the penalty fees being collected from Mr. Pepion and/or a waiver in that amount for the 2000 grazing season." Appellant's Notice of Appeal to the Regional Director at 2.

^{1/} It is not clear whether Appellant's request was written or oral. There is no copy of a written request in the record.

On April 4, 2003, the Regional Director affirmed the Superintendent's decision. Citing 25 C.F.R. § 166.24(b) (1999) 2/ and Kimmett v. Billings Area Director, 22 IBIA 148 (1992), he stated that it was discretionary with BIA as to whether Appellant would receive any of the trespass damages to be collected from Pepion. He then stated:

[Your] statement of reasons does not demonstrate that you deviated from the permitted number of livestock by shortening your grazing season or reducing the number of livestock in Range Unit 207.

Your statement of reasons also implies that the trespass resulted in a hardship on your operation and financial loss, but you failed to provide documentation to support this claim.

Regional Director's Apr. 4, 2003, Decision at 1-2. For these reasons, the Regional Director stated, he was affirming the Superintendent's decision.

Appellant then appealed to the Board. He repeated the allegations he made before the Regional Director. Then, for the first time on appeal to the Board, he made additional statements concerning his inability to make full use of RU 207:

On June 16, 1999 I moved 100 head of cattle on to unit #207. On July 15, 1999 I removed 75 head to unit #158 through an agreement I had made with the lessee, this move was required in order to have sufficient grazing for my stock. On September 1, 1999 I removed the remaining 25 head of cattle due to no more grass available. The grazing season for Unit #207 is June 1 through October 15, for 50 head of cattle. Unit #207 has 307 AUM's this would allow 6 months of grazing. I was only able to utilize[] 137 AUM's during this grazing season which is 44% of what I paid for [on] March 10, 1999.

Appellant's Notice of Appeal to the Board at 1-2.

Appellant should have made and supported these statements when he first requested reimbursement from the Superintendent or, at the latest, in his appeal to the Regional Director. By the time he appealed to the Regional Director, he was aware that BIA was attempting to collect trespass penalties and damages from Pepion. To the extent that Pepion's trespass, and not the lack of rain, caused a reduction in the grazing capacity of RU 207, BIA might have

2/ BIA's grazing regulations were extensively revised in 2001. The grazing regulations which were in effect in 1999 remained in effect during all times relevant to this appeal.

been willing to consider reimbursing Appellant out of the damages to be collected from Pepion under 25 C.F.R. § 166.24(b) (1999), which required the collection of penalties and damages for unauthorized grazing and which provided in part: “All payments for such penalties and damages shall be credited to the landowners where the trespass occurs except that the value of forage or crops consumed or destroyed may be paid to the lessee of the lands not to exceed the rental paid.”

Appellant is a permittee, rather than a lessee. However, it appears from the Regional Director’s decision that he would have considered Appellant eligible for payment under this provision had Appellant presented support for his contention that Pepion’s trespass caused a loss to him. ^{3/} As noted, however, the Regional Director found that Appellant had provided no such support.

Appellant’s appeal to the Regional Director included only the broadest allegation concerning the loss he suffered from Pepion’s trespass, *i.e.*, that the trespass “resulted in creating a hardship on [Appellant’s] operations and financial loss in weight and gains of [Appellant’s] livestock.” Appellant’s Notice of Appeal to the Regional Director at 2. Further, he acknowledged in that appeal that some of the loss of forage was caused by a lack of rain. Accordingly, he failed to provide the Regional Director with enough information to permit a determination as to whether he should be considered for payment under 25 C.F.R. § 166.24(b) (1999).

The Regional Director did not specifically address Appellant’s request that he be reimbursed through a waiver of part of his rent for 2000. This approach would have resulted in a reduced payment to the landowners and thus, to the extent it could be considered at all, ^{4/} would require substantially more justification than Appellant presented to BIA.

The Board ordinarily does not consider arguments or evidence presented for the first time on appeal to the Board. *E.g.*, Miller v. Rocky Mountain Regional Director, 39 IBIA 57, 60 (2003); Smith v. Acting Eastern Oklahoma Regional Director, 38 IBIA 182, 185 (2002).

^{3/} Thus it appears that the Regional Director interpreted 25 C.F.R. § 166.24(b) (1999) to authorize payments to permittees as well as lessees. Given that a permittee might suffer loss of forage from a trespass to the same extent a lessee would, the Regional Director’s interpretation of the provision is a reasonable one.

^{4/} If Appellant suffered a loss by reason of Pepion’s trespass, it would plainly be inappropriate to compensate Appellant for that loss through reduced payments to the landowners. The Board expresses no opinion here as to whether there are any circumstances under which payment to landowners might be reduced.

In this case, where BIA had discretion in determining whether to compensate Appellant under 25 C.F.R. § 166.24(b) (1999), and where BIA's review authority is therefore limited, Kimmet, 22 IBIA at 151, it is particularly appropriate for the Board to follow its usual practice. Accordingly, the Board does not consider the statements Appellant makes for the first time in his appeal to the Board.

The Board finds that Appellant has failed to show error in the Regional Director's April 4, 2003, decision.

Docket No. IBIA 03-114-A

On July 29, 1999, landowners holding majority interests in Blackfeet Allotments 503, 546, 548, and 549-A filed with the Superintendent requests to have the allotments withdrawn from RU 207. The landowners stated that they wanted the withdrawals to be effective December 31, 1999, and indicated that they intended to enter into leases with Pepion.

Under 25 C.F.R. § 166.15(c) (1999), the Superintendent was required to give Appellant 180 days written notice before withdrawing land from his grazing permit. However, it was not until March 29, 2000, that the Superintendent gave Appellant notice that Allotments 503, 546, 548, and 549-A were being withdrawn from his grazing permit for the 2000 grazing season. On April 19, 2000, the Superintendent wrote a second letter to Appellant, acknowledging that Appellant should have been given 180 days notice but stating that, because the landowners had submitted their requests in a timely manner, and because BIA's primary obligation was toward the landowners, the withdrawal was made effective on March 10, 2000, the permit anniversary date.

Appellant appealed to the Regional Director, contending that the belated notice was in violation of 25 C.F.R. § 166.15(c) (1999) and deprived him of the opportunity to make alternative arrangements for his cattle, thereby causing him economic hardship. In his April 25, 2003, decision, the Regional Director acknowledged that the Superintendent failed to give Appellant the required notice but found that the Superintendent acted in the best interest of the landowners, who would receive more income from the leases to Pepion than from Appellant's grazing permit. The Regional Director therefore affirmed the Superintendent's decision to withdraw the four allotments from Appellant's grazing permit.

On appeal to the Board, Appellant again contends that BIA erred in failing to give him 180 days notice, as required by 25 C.F.R. § 166.15(c) (1999). As relief, he requests that the Board order the four allotments returned to RU 207 and grant him monetary compensation for the economic hardship he has suffered as a result of the withdrawal of those allotments from his range unit.

Appellant does not contend that the landowners' withdrawal requests were invalid or that BIA committed any error other than failing to give him 180 days notice of the withdrawal. Thus, Appellant appears to recognize that the withdrawal would have become effective in September 2000 if BIA had given him the required 180 days notice, counted from March 29, 2000, the date of the Superintendent's notice to him. ^{5/}

There is no doubt that BIA erred, as both the Superintendent and the Regional Director recognized. Under the circumstances of this case, however, the Board cannot grant Appellant any relief.

The Board cannot order the allotments returned to RU 207 at this time because, at least since September 2000 (180 days after notice to Appellant), they have been properly withdrawn from the range unit. Further, the Board cannot grant Appellant any monetary compensation because it lacks authority to award money damages. *E.g.*, Dailey v. Billings Area Director, 34 IBIA 128, 129 (1999); Toyon Wintu Center v. Sacramento Area Director, 29 IBIA 290, 295 (1996). Accordingly, the Board lacks authority to grant the relief Appellant requests.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Regional Director's April 4, 2003, decision is affirmed and Appellant's appeal from the Regional Director's April 25, 2003, decision is dismissed for lack of authority to grant the relief requested.

I concur:

// original signed
Anita Vogt
Senior Administrative Judge

// original signed
Steven K. Linscheid
Chief Administrative Judge

^{5/} Of course, BIA should have given Appellant notice at least 180 days prior to Mar. 10, 2000, the permit anniversary date, in order to allow Appellant a reasonable time to make other arrangements for his cattle, while minimizing any adverse impact on the landowners.